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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CATHY A. CATTERSON
U.S. COURT OF APPEALS

CALIFORNIA DEPARTMENT OF TOXIC
SUBSTANCES CONTROL,

Plaintiff - Appellant,

v.

ESTATE OF HERBERT S. MCDUFFEE,
JR., deceased; CHRISTINE E. MCDUFFEE;
AEROJET GENERAL CORP; CHEVRON
CORPORATION; PACIFIC GAS AND
ELECTRIC COMPANY; R. L. NIELLO,
INC.; CITY OF SACRAMENTO; COUNTY
OF SACRAMENTO; SACRAMENTO
MUNICIPAL UTILITY DISTRICT;
TEXACO MARKETING AND REFINING,
INC.,

Defendants - Appellees,

and,

CHARLES V. KESTER; RAVIND
SHANKAR; SHARON L. STONE; MID
VALLEY DEVELOPMENT, INC.;
GORDON TURNER MOTORS, INC.;
TIECHERT, INC.; UNITED STATES AIR
FORCE,

Defendants.

No. 02-17027

D.C. No. CV-02-00018-GEB

ORDER*

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, District Judge, Presiding

Argued and Submitted October 8, 2003
San Francisco, California

Before: HAWKINS, THOMAS, and CLIFTON, Circuit Judges.

This appeal was brought from the district court's order denying a motion to dismiss counterclaims alleged to be improper under Fed.R.Civ.P. 13. Ordinarily, this court does not have jurisdiction to entertain an appeal from such an order because the order does not represent a final decision under 28 U.S.C. § 1291. The term "final decision" has been interpreted to cover a small category of collateral orders that do not terminate the litigation, where the order is conclusive, resolves an important question separate from the merits of the claim, and would be effectively unreviewable on appeal from a final judgment in the underlying action. *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 204 (1999). In light of the presentations made to us, notably the position of Plaintiff with regard to the possibility that the State may or may not plead an Eleventh Amendment defense to the counterclaims at issue or to any third-party claims that may be stated against other State agencies, it does not appear that this falls within the small category of collateral orders over which we properly have appellate jurisdiction. *See Duran v.*

City of Douglas, Ariz., 904 F.2d 1372, 1375 (9th Cir. 1990) (holding that a merits panel may reconsider a motion panel's previous jurisdictional determination).

APPEAL DISMISSED.